NO.

21676

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE CHABOLLA-DELGADO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

DAVID C. MARCUS
Attorney at Law
215 West Fifth Street
Los Angeles, California 90013

Telephone: 628-4788

Attorney for Petitioner

NO.
21676

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE CHABOLLA-DELGADO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

DAVID C. MARCUS
Attorney at Law

215 West Fifth Street
Los Angeles, California 90013

Telephone: 628-4788

Attorney for Petitioner

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Constitutions

Decisions

NO. 21676

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE CHABOLLA-DELGADO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S OPENING BRIEF

JURISDICTION

Jurisdiction is invoked under the provisions of 106(a) of the Immigration and Nationality Act, as amended, and Section 1105(a) of Title 8 U.S.C.

STATEMENT OF FACTS

Petitioner, thirty-three years of age, a native and citizen of Mexico, was admitted to the United States on November 28, 1960. Petitioner's wife is a United States citizen and there are four native born United States citizen children issue of this marriage, all of whom are wholly dependent upon him for support. (C.A.R. pp. 28-19*.)

* Certified Administrative Record

In an information filed by the District Attorney of Los Angeles County, petitioner was charged on March 2, 1965, in the Superior Court of Los Angeles County, with a violation of section 11530 of the Health and Safety Code of the State of California, to wit, possession of marijuana. (C.A.R. p. 59; Exhibit 3.)

On June 16, 1965, a trial of said proceedings was had and the court made the following findings:

> ". . . . Court finds Defendant 'Guilty', as charged. A Probation Officer's report is ordered. Further proceedings and motion for a new trial, continued to July 8, 1965, 9 A.M. Time waived. Remain on bail." (C.A.R. p. 60.)

On August 31, 1965, the said superior court made and entered the following order:

> ". . . . Defendant's motion for a new trial is withdrawn. Proceedings suspended. Probation granted for four years. . . . Pay fine of $250.00 through Probation Officer in such manner as such officer shall prescribe plus penalty assessment. Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale. Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate. Not assiciate with known narcotic users of sellers. Seek and maintain employment as

approved by Probation Officer. Support dependents as directed by Probation Officer. Maintain residence as approved by Probation Officer. Obey all laws, orders, rules and regulations of Probation Department and of the Court." (C.A.R. p. 61.)(Emphasis added.)

On April 18, 1966, respondent Immigration and Naturalization Service caused an Order to Show Cause, and Notice of Hearing and Deportation Proceedings to be issued charging petitioner, a citizen and native of Mexico, with being subject to deportation under the provisions of 241(a)(11) of the Immigration and Nationality Act, in that he had been convicted of a violation of law relating to elicit possession of marijuana in violation of section 11530 of the Health and Safety Code of the State of California, in that he had, on June 16, 1965, in the Superior Court of the State of California been convicted of the offense of unlawful possession of marijuana in violation of section 11530 of the Health and Safety Code of the said state. (C.A.R. p. 38.) Hearings were conducted before said Service on May 5, 1966, May 12, 1966, and August 2, 1966. (C.A.R. pp. 16-37.) On September 30, 1966, the Special Inquiry Officer made and entered his decision, finding that the petitioner had been found guilty of a violation of section 11530 of the Health and Safety Code of the State of California on August 31, 1965, that petitioner was a deportable alien under the provisions of section 241(a)(11) of the

Immigration and Nationality Act, and ordered his deportation from the United States, and further found that petitioner was ineligible for any relief either statutory or discretionary. (C.A.R. pp. 13-15.)

An appeal was duly perfected to the Immigration Board of Appeals, and on January 9, 1967, the decision of the Board affirmed the decision of the Special Inquiry Officer and dismissed the appeal. (C.A.R. pp. 2-4.) The petitioner was ordered by the Immigration Service to surrended on March 15, 1967. The Petition for Judicial Review was filed with this Court on or about March 15, 1967, to review the actions of the Immigration Service in ordering the deportation of the petitioner from the United States.

POINTS RELIED UPON

1. Petitioner is not a deportable alien.

2. Petitioner was not convicted of a crime subjecting him to deportation.

3. The order of deportation is not predicated upon clear, convincing, and unequivocal proof.

4. The deportation of the petitioner is cruel and inhuman punishment, in violation of the Eighth Amendment of the Constitution of the United States.

5. Petitioner has not been convicted of any law, rule, or regulation relating to the illicit possession or traffic in marijuana as defined by Title 8, 1251(a)(11)

of the Immigration and Nationality Act.

ARGUMENT AND AUTHORITIES

Petitioner was charged with being a deportable alien under the provisions of section 1251 of Title 8, U.S.C., which reads in part as follows:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who --

. . . .

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the llicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marijuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or

any addition-forming or addiction-sustaining opiate;"

Petitioner herein was found guilty of simple possession of marijuana. After the finding of guilt, his proceedings were suspended, he was fined $250.00 and place on probation for a period of four years, with other specific provisions of his probationary order dated August 31, 1965. No jail sentence was imposed. This probationary order is still effective and petitioner is within the supervisory power of the Superior Court of the State of California for Los Angeles County.

The Special Inquiry Officer and the Board of Immigration Appeals determined that the instant case was governed by the decision of this Court in Arrellano-Flores v. Hoy, (9th Cir. 1958) 262 F. 2d 667 (In the Matter of Arrellano-Flores, 8 I & N Dec. 429).

It is to be noted that there is a clear factual distinction between the instant matter and the Arrellano-Flores case, supra, for, as Circuit Judge Chambers indicated in his opinion, Flores was

". . . found guilty after a California trial on a criminal charge that he unlawfully sold marihuana, a substance classified as a narcotic." 262 F. 2d 667.

Section 1251(a)(11) in effect at the time of the Arrellano-Flores decision provided that an alien is

deportable who at any time after entry "has been convicted of a violation of . . . any law . . . governing the . . . sale . . . of . . . marihuana . . . ." This distinction between sale and possession of marijuana as grounds for deportation under the then existing statute (8 U.S.C. 1251(a)(11)) is forceably dealt with in the matter of Hoy v. Mendoza-Rivera, (9th Cir. 1959) 267 F. 2d 451, wherein Mendoza-Rivera, a Mexican alien convicted in the state court of possession of marijuana and sentenced to ninety days in jail. After proceedings based upon this state conviction he was ordered deported from the United States. This Court held under the amended statute, effective July 18, 1956:

> ". . . . When the words 'conspiracy to violate' and 'possession of' were added by amendment to the first clause of the Act, so that for the first time a person was subject to deportation because of a conviction for the offense of illicit possession of narcotic drugs, and the second provision, permitting deportation of any person convicted of offenses relating to enumerated drugs including marijuana, which originally and as amended contained the words 'governing * * * the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of * * * marijuana' and which remained unchanged except for the addition

of the words 'or a conspiracy to violate,' the intention drawn from the amendment to the text clearly is that conviction of possesion [sic] of a narcotic drug is sufficient, but that 'possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of * * * marijuana' was needed before a person could be deported under the section. Mendoza-Rivera was only convicted of simple possession of marijuana. He does not fall in the ambit of the enactment." 267 F. 2d 451, 452.

See also, Hoy v. Rojas-Gutierrez, (9th Cir. 1959) 267 F. 2d 490, wherein this Court ruled:

"Arnulfo Rojas-Gutierrez was ordered deported to Mexico after a hearing on October 19, 1956. He had been previously convicted in the California state courts on March 11, 1938, November 13, 1945, and April 8, 1949, each time for having had in his possession the flowering tops and leaves of Indian Hemp (Cannabis Sativa Marijuana). These offenses constituted the sole ground for the order.

"Previously, he had been subject of deportation proceedings on the ground that he had been convicted of the crime of burglary before his entry into the United States. The hearing terminated by a finding

in his favor.

"After the present order of deportation, he initiated a suit in the nature of a declaratory judgment proceeding. The sole cause of the order of deportation lies in the provisions of Section 241(a)(11) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1251). There were not issues of fact in the declaratory judgment proceeding. The trial court issued a declaratory judgment to the effect that Arnulfo Rojas-Gutierrez was not deportable. The District Director took this appeal.

"The sole question is whether appellee is subject to deportation because he has been found guilty under the California state statutes of simple possession of marijuana. This Court has ruled today, in Hoy, District Cirector v. Mendoza-Rivera, 267 F.2d 451 that the statute does not include such cases. The District Judge in this case purported to follow the Mendoza-Rivera holding in the District Court. Nevertheless, the authority of Judge Mathes strengthens that position, and we find it in accord with our own thinking. Rojas-Gutierrez v. Hoy, D.C., 161 F. Supp. 448."

In 1960, Section 1251(a)(11) was amended by Public Law 86-648 by inserting "or marijuana" following

"narcotic drugs." The amended statute is set forth, supra, verbatim.

In Garcia-Gonzales v. Immigration & Nat. Service, (9th Cir. 1965) 344 F. 2d 804, this Court affirmed the order of deportation of an alien who had been convicted of a violation of section 11500 and section 11501 of the California Health and Safety Code. Section 11500 of the California Health and Safety Code provides that every person who possesses any narcotic "other than marijuana" is guilty of a felony and shall be punished by imprisonment in a state prison for not less than two years nor more than ten years. (Cal. Health and Safety Code § 11500.) Section 11501 of the same Code provides that any person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away "any narcotic other than marijuana . . . shall be punished by imprisonment in the state prison from five years to life. . . ." (Cal. Health & Safety Code § 11501.) The alien's conviction was expunged under California law pursuant to the provisions of section 1203.4 of the Penal Code of the State of California. The court held, citing Arrellano-Flores v. Hoy, (9th Cir. 1958) 262 F. 2d 667, that expungement of the conviction of the unlawful possession, transportation, and sale of heroin did not expunge the record upon which the deportation order rested.

In the recent case of Kelly v. Immigration and Naturalization Service, (9th Cir. 1965) 349 F. 2d 473, petitioner was charged with being a deportable alien under 8 U.S.C. § 1251(a)(11) after a conviction and sentence by the courts for violation of section 11531 of the California Health and Safety Code, which section provided as follows:

> "Every person who transports, imports into this State, sells, furnishes, administers or gives away, or offers to transport, import into this State, sell, furnish, administer, or give away, or attempts to import into this State or transport any marijuana shall be punished by imprisonment in the state prison from five years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than three years."

His conviction was expunged under section 1203.4 of the California Penal Code. This Court, citing Garcia-Gonzales v. Immigration & Nat. Service, supra, and Arrellano-Flores v. Hoy, supra, as authority, determined that expungement did not wipe out the record of conviction and that the alien was nevertheless deportable. Circuit Judge Ely dissented.

It is to be noted, therefore, that the entire treatment and prevailing opinion respecting the Court's interpretation of Section 1251(a)(11) of Title 8 U.S.C.

was born from the nucleae of Arrellano-Flores v. Hoy, supra. Circuit Judge Chambers, the author of the opinion, stated:

> "While one cannot close one's eyes to the state's statutes and what transpired in the state's proceedings, we are inclined to the belief that perhaps here Congress intended to do its own defining rather than leave the matter to the variable state statutes. . . . " 262 F. 2d 667, 668.

Under the impact of Arrellano-Flores, this Court determined in Hernandez-Valensuela v. Rosenberg (9th Cir. 1962) 304 F. 2d 639, that a youth committed under the Federal Youth Commission Act, under which his conviction as a youth offender was automatically set aside upon his discharge, did not have the effect of rendering his conviction not final. In Zabanazad v. Rosenberg (9th Cir. 1962) 306 F. 2d 861, the alien was a youth offender committed to the California Youth Authority. This Court affirmed his deportation under the provisions of Section 1251(a)(11). In Adams v. United States (9th Cir. 1962) 299 F. 2d 327, the defendant was found guilty in the Superior Court of the State of California for possession of marijuana in violation of Section 11500 of the Health and Safety Code and committed to the Youth Authority. This Court held that he had been convicted within the meaning of 18 U.S.C. § 1407 and was deportable under the provisions of Section 1251(a)(11)

The nebulous language of Arrellano-Flores v. Hoy, supra, wherein this Court stated that "we are inclined to the belief that perhaps here Congress intended to do its own defining rather than leave the matter to the variable state statutes" has been enlarged to meet the variety of cases never intended or encompassed by Arrellano, but used as authority. We believe that this same Court should now reappraise Arrellano in light of the enlightening recent opinions from the Supreme Court of the United States which interpret the Immigration Act and the burden and the quality of evidence required in deportation proceedings.

Although deportation proceedings are civil in their nature, the consequences of the deportation can be more serious and exacting a greater penalty than the conviction of a crime.

In Tan v. Phelan (1947) 333 U.S. 6, the Supreme Court was called upon to give statutory construction involving the deportation of an alien sentenced more than once for a term of one year or more because of conviction of a crime involving moral turpitude committed after his entry. The Supreme Court, in reversing this Circuit, stated:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 US 388, ante, 17, 68 S Ct 10. It is the forfeiture for misconduct

of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." 333 U.S. 6, 10.

In Delgadillo v. Carmichael (1944) 332 U.S. 388, cited as authority in Tan v. Phelan, supra, Justice Douglas writing, the Supreme Court reversed this Circuit, as follows:

"Deportation can be the equivalent of banishment or exile. See Bridges v. Wixon, 326 US 135 . . . . The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme." 332 U.S. 388, 391.

In Barber v. Gonzales (1953) 347 U.S. 637, Justice wrote:

". . . . Although not penal in character, deportation statutes as a practical matter may inflict

'the equivalent of banishment or exile,' Fong Haw Tan v. Phelan, 333 US 6, 10. . ., and should be strictly construed. See Delgadillo v. Carmichael, 332 US 388, 391. . . . In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning." 347 U.S. 637, 642-643.

In Carmichael v. Delaney (9th Cir. 1948) 170 F. 2d 239, this Court held:

"Throughout history banishment or exile has been looked upon as a penalty little less dreadful than death. To one in appellee's situation exclusion is in substance and practical effect the equivalent of banishment. It involves the same severance from home and existing ties that the individual suffers who is expelled from the country in a proceeding to deport. There is no difference in their loss of freedom of movement or in the nature of the hardships they are called upon to undergo. The sole distinction resides in the mere matter of nomenclature. The distinction, we think, is of no moment insofar as concerns the Constitutional guaranty of due process of law." 170 F. 2d 239, 245.

How true this language when made applicable to the

instant proceedings. The alien with a wife and four children, citizens of the United States, is banished for life, separated from his family, home, friends, and surroundings. This, indeed, is punishment worse than death, though inflicted under the guise of civil processes in deportation proceedings.

The criminal penalty for this offense was a fine of $250.00 and probation, with no term of imprisonment. The effect of these deportation proceedings is punishment far greater, more serious, harsh, and cruel than the actual penalty for the commission of the crime itself.

It appears that it is now an appropriate time to exercise some restraint upon the interpretation given Arrellano. It does not seem to measure with due administration of justice that a person who is found guilty of or convicted of possession of a small amount of marijuana, given probation and a minimum fine, with some regulatory conditions of probation, should be subjected to cruel and inhuman exactions of the law, that he should be banished and barred from his family, children, home and surroundings for life. This does not square with the traditional American policy of fairness and even-handed justice.

It is the petitioner's contention, therefore, that no matter by what process, whether criminal or civil, the exaction of banishment with all its consequences is cruel and inhuman under the circumstances of this case, and a

violation of the Eighth Amendment of the United States Constitution.

In Woodby v. Immigration Service and Sherman v. Immigration Service, 17 L ed 362, 369, decided December 12, 1966, the Court, speaking through Justice Stewart, determined:

> "We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Accordingly, in each of the cases before us, the judgment of the Court of Appeals is set aside, and the case is remanded to those courts with directions to remand to the Immigration and Naturalization Service for such further proceedings as, consistent with this opinion, it may deem appropriate."

Indeed, the Arrellano-Flores case opinion, and its later satellites, leaves considerable to be desired in the light of Woodby and Sherman, supra, and lends further dignity and support to the eloquent dissenting opinion of Judge Ely in Kelly v. Immigration and Naturalization Service, supra.

CONCLUSION

Petitioner respectfully requests that the proceedings be remanded with directions to annul the order of deportation.

Respectfully submitted,

David C. Marcus

DAVID C. MARCUS

Attorney for Petitioner

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 215 West Fifth Street, Chester Williams Building, Suite 223, Los Angeles, California.

On June 21, 1967 I served the within Petitioner's Opening Brief and Affidavit on the respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Honorable Matthew Byrne, Jr.
United States Attorney
6th Floor - United States Courthouse
Los Angeles, California

United States Department of Justice
Immigration and Naturalization Service
300 North Los Angeles Street
Los Angeles, California

Kay Ventle
KAY VENTLE

Subscribed and sworn to before me this 21st day of June, 1967.

Mildred S. Barnes
Mildred S. Barnes, Notary Public

OFFICIAL SEAL
MILDRED S. BARNES
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires August 13, 1971